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No. 98-1801

IN THE
Supreme Court of the United States

BOBBY WAYNE SWISHER,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

REPLY OF PETITIONER

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The arguments made in Respondent's opposition brief merit a short reply. First, as shown below, Respondent's assertion that Petitioner failed to preserve his Fourth Amendment claim is both factually and legally erroneous. In fact, Respondent addressed the Fourth Amendment question of voluntariness *at length* before the Virginia Supreme Court in its Brief in opposition to the direct appeal. Second, contrary to Respondent's claims, Petitioner *has* raised an important legal, non-fact-specific issue —namely, whether a "knowing and intelligent waiver" standard should be applied to determine whether consent given by an individual in custody at a police station is voluntary under the Fourth Amendment. Finally, Respondent's harmless error argument lacks merit.

I. RESPONDENT'S CONTENTION THAT PETITIONER FAILED TO PRESERVE THE FOURTH AMENDMENT QUESTION AT ISSUE IS MERITLESS

Respondent concedes that Petitioner's pre-trial motion to suppress evidence based on violations of the Fourth and Fourteenth Amendments included "a request to suppress evidence obtained as a result of a luminol test performed on the jacket Swisher wore" to the police station (Respondent's Brief at 6 ("Resp. Br.")). Respondent further acknowledges that the trial court ruled on this motion, finding that "the search of the jacket was consensual" (Resp. Br. at 6). Moreover, Petitioner's objection to the ruling of the trial court was plainly noted in the record (Appendix C to the petition at 27a ("Pet. App.")).

Accordingly, Respondent's entire preservation argument turns on whether this point of law—that Petitioner voluntarily consented to the testing and seizure of his jacket—was preserved on direct appeal. A review of the record, however, plainly establishes that this issue has been preserved and is ripe for review by this Court.

Petitioner appealed the trial court's denial of the identical motion to suppress that Respondent readily concedes included "a request to suppress evidence obtained as a result of a luminol test performed on the jacket Swisher wore" to the police station (Pet. App. E at 29a-32a; Pet. App. F at 33a-35a). Nevertheless, Respondent contends that this appeal did not raise the same questions addressed by the trial court regarding the voluntariness of Petitioner's consent to the luminol test and seizure of the jacket (Resp. Br. at 6).

The position Respondent attempts to take before this Court, however, is contradicted by its position before

the state supreme court. There, Respondent plainly understood that Petitioner's direct appeal raised the issue of the voluntary nature of his consent, since Respondent's Brief in opposition to the appeal addressed this question of voluntariness *at length* (App. at 1a-3a).[1]

Likewise, Respondent's claim that the Virginia Supreme Court "never decided [this] issue" is clearly contradicted by that Court's opinion (Resp. Br. at 6). Finding that the trial court did not err in denying Petitioner's motion to suppress, the Virginia Supreme Court explained that:

> Swisher gave the deputies consent to test his jacket. The evidence of record supports the trial court's finding that in each instance, Swisher's consent was voluntary [(Pet. App. A at 14a)].

Accordingly, Petitioner undeniably preserved for appeal the issue of whether he voluntarily consented to the testing and seizure of his jacket under the Fourth Amendment. Of course, the fact that the state supreme court has passed upon this issue by itself permits review by this Court. *See Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("[E]ven if this *were* a claim not raised by petitioner below, we would ordinarily feel free to address it, since it was addressed by the court below. Our practice 'permit[s] review of an issue not pressed so long as it has been passed upon . . . .' ").

Respondent also asserts that Petitioner did not preserve this Fourth Amendment claim because Petitioner "never alleged that his consent was unknowing and unintelligent because he allegedly was 'in custody' at the time of the consent" (Resp. Br. at 7). This "knowing and intelligent waiver" argument, however, is merely a separate argu-

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[1] "App." refers to the Appendix to this Reply.

ment in support of the same Fourth Amendment claim preserved on appeal and thus is properly before this Court.[2] *See, e.g., Lebron*, 513 U.S. at 379 ("Our traditional rule is that 'once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" (quoting *Yee*, 503 U.S. at 534)); *Dewey v. Des Moines*, 173 U.S. 193, 197-98 (1899) ("[I]f the question were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in substance as to form but another ground or reason for alleging the invalidity of the [lower court's] judgment, we should have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued.").

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[2] Respondent's reliance on *Yee* and *Gates* in support of the contention that Petitioner did not properly preserve the question of voluntariness is misplaced. *Yee* and *Gates*, unlike this case, involved situations where the petitioner raised a particular *claim* for the first time in a petition for certiorari. *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992) (refusing to review a due process claim proffered by petitioners since the claim at issue was not raised or addressed below); *Illinois v. Gates*, 462 U.S. 213, 220-21 (1983) (refusing to address the issue of a modification of the exclusionary rule because the question was never raised or addressed below). In fact, another part of the *Yee* case *supports* Petitioner's position that he preserved the Fourth Amendment claim on appeal. Specifically, the *Yee* Court allowed petitioners' regulatory takings argument to proceed even though it was unclear whether the appeals court addressed this issue. *Yee*, 503 U.S. at 534-35. In so holding, the Court noted that "[p]etitioners regulatory taking argument stands in a posture different from their substantive due process claim. Petitioners unquestionably raised a taking claim in the state courts . . . . Petitioners' arguments that the ordinance constitutes a taking in two different ways, by physical occupation and by regulation, are not separate *claims*. They are, rather, separate *arguments* in support of a single claim . . . ." *Id.* Likewise, Petitioner's claim in this case is simply an additional argument in support of the preserved Fourth Amendment claim.

II. CONTRARY TO THE STATE'S CONTENTION, PETITIONER HAS RAISED AN IMPORTANT LEGAL, NON-FACT-SPECIFIC QUESTION

A. This Legal Question Is Properly Before This Court Because Petitioner Was In Custody At The Time The Testing And Seizure Of His Jacket Occurred

There is no dispute that Petitioner was handcuffed, brought to the police station and questioned for over two hours by three police officers without *Miranda* warnings, and that key evidence in this case—his jacket and blood-stains on his jacket—was obtained from Petitioner during this period (J.A. 455-56; Resp. Br. at 3-4, 6). Petitioner argues that in a situation like this—when a defendant is in custody at a police station—the Fourth Amendment requires the State to establish that the defendant gave a "knowing and intelligent waiver" of his right to refuse consent to search. In an earlier case, this Court explained that, under such a standard, the State would have the burden to demonstrate "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The State could fulfill its burden by establishing that an individual was informed of his right to refuse consent or otherwise knew of this right before consent to search was given.

The State, however, argues that this question is not properly before this Court because Petitioner was not in custody at the time the search of the jacket occurred (Resp. Br. at 8). As noted in the petition, however, the trial court as factfinder *assumed* that Petitioner was in custody during the two hour interrogation in which the luminol blood test was performed, but found that fact to be irrelevant to Petitioner's motions to suppress (Pet. App. C at 24a, 26a-27a) ("In this case, Mr. Swisher consented to every aspect of this matter, all along. So gentlemen, there were no statements taken from him be-

tween the time that he agreed to go to the Sheriff's Department [to the time he was arrested] even if you assume at that point he was in custody.").

The Virginia Supreme Court affirmed the trial court's finding on this point (Pet. App. A at 12a).[3] Thus because the trial court assumed that Petitioner was in custody, the necessary factual predicate for the Fourth Amendment issue here is established and Respondent's argument to the contrary is without merit.

B. The State Has Not Offered Any Evidence To Establish That Petitioner Gave A "Knowing And Intelligent Waiver" Of His Fourth Amendment Rights

Respondent also argues that the petition has no merit because "it is clear that Swisher knowingly and intelligently consented to having his jacket tested" (Resp. Br. at 9). Respondent's argument misses the mark. In making this argument, Respondent relies on the following two pieces of testimony from Sergeant Lemerise: 1) Sergeant Lemerise testified that he explained the purpose of the luminol test to Petitioner and asked Petitioner whether the police could test his jacket and, in response, Petitioner replied "that's all right with me, because I don't know nothing about what you're talking about"[4] and 2) Sergeant Lemerise testified that he later told Petitioner that the luminol test was positive, asked Petitioner for permis-

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[3] Moreover, the facts plainly establish that Petitioner *was* in custody at the time the testing and seizure of his jacket occurred (Petition for Certiorari at 2-5).

[4] It appears that the State and the Virginia Supreme Court misquoted Petitioner's testimony on this point. According to the trial transcript, Petitioner's response to the Sergeant's explanation was "go ahead, I don't know anything about what you're talking about" (J.A. 456). Regardless, neither response suggests that Petitioner gave a "knowing and intelligent waiver" of his Fourth Amendment rights.

sion to further test the jacket, and received Petitioner's consent in response (*id.*).

At best, this testimony demonstrates that, after being advised that the police wanted to test the jacket for blood, Petitioner acquiesced to their wishes. It unquestionably does not establish that Petitioner was informed of his right to refuse consent or otherwise knew of this right, for purposes of a Fourth Amendment waiver. Accordingly, Respondent's argument to the contrary is without merit.

III. THE ADMISSION OF THE LUMINOL BLOOD TEST AND THE JACKET WAS NOT HARMLESS ERROR

Finally, Respondent's harmless error argument must also fail. Before a federal constitutional error can be held harmless, "the court must be able to declare a belief that it was harmless *beyond a reasonable doubt*." *Chapman v. California*, 386 U.S. 18, 24 (1967) (emphasis added). It is the prosecution's burden to establish that there was " '[no] reasonable possibility that the evidence complained of might have contributed to the conviction.' " *Id.* at 24 (citation omitted). Under this governing standard, the trial court's constitutional errors in refusing to suppress the luminol blood test and jacket were plainly not harmless.

The prosecution relied heavily on the blood evidence obtained from the jacket at trial, emphasizing the victim's rare blood type and the presence of this blood type on Petitioner's jacket (J.A. 1122). The State also highlighted the presence of the blood on the arm of Petitioner's jacket, in support of the contention that the victim bled on Petitioner as he cut her throat (*id.*). No other physical evidence offered similar circumstantial support for this contention.

Significantly, according to the testimony of Sergeant Lemerise, the seizure of the jacket led to Petitioner's

arrest (J.A. 420, 461), which in turn led to the confession and the acquisition of more physical evidence from Petitioner (J.A. 931-33, 1017-1018). Moreover, this was the first piece of physical evidence taken from Petitioner that linked him to the crime, and was considered by the prosecution to be "very important" (*id.*).

Accordingly, the record clearly reflects a " 'reasonable possibility that the evidence complained of might have contributed to the conviction' " (*Chapman*, 386 U.S. at 24 (citation omitted)), and therefore the errors in admitting the luminol blood test and jacket were not harmless beyond a reasonable doubt.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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